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June 23, 2014

**PUBLIC DOCUMENT**

The Honorable Penny Pritzker  
Secretary of Commerce  
U.S. Department of Commerce  
Attn: Import Administration  
APO/Dockets Unit, Room 1870  
14th Street & Constitution Avenue, N.W.  
Washington, D.C. 20230

Re: Korea Electronics Association's Comments on Differential Pricing Methodology

Dear Madam Secretary:

With this submission Korea Electronics Association ("KEA") hereby provides its comments in response to the Commerce Department's request for comments regarding the continued development of a methodology for determining whether the legal criteria set forth in Section 777A(d)(1)(B), 19 U.S.C. 1677f-1(d)(1)(B), of the Tariff Act of 1930, as amended, have been satisfied and thereby justify use of an alternative comparison methodology for calculating antidumping ("AD") margins. *See Differential Pricing Analysis, Request for Comments*, 79 Fed. Reg. 26,720 (May 8, 2014).

KEA appreciates the opportunity to provide these comments to the Department.  
The comments are enclosed.

Respectfully submitted,

/s/ Daniel L. Porter

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**Before the United States Department of Commerce  
International Trade Administration**

**COMMENTS OF KOREA ELECTRONICS ASSOCIATION**

***Concerning Improvements for the Commerce Department's  
Differential Pricing Methodology***

William H. Barringer  
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## Table of Contents

	Page
INTRODUCTION .....	1
A.    The Methodology Should Reflect That The Governing Legal Criteria Create An Exception, And Are Not Meant to Establish A Rule.....	2
B.    The Department Should Adopt A Proper Interpretation of The Statutory Term “Significantly” .....	4
C.    The Department Should Not Ignore Statistics When Adopting Improvements To Its Methodology .....	9
D.    Commerce Should Explain More Clearly Why Averaging Cannot Take Into Account Price Differences.....	11
E.    The Department Should Apply The Concept of Negligibility.....	13
F.    The Remedy Should Not Be Applied To Transactions for Which The Department Has Determined Have Not Met The Criteria .....	15
G.    The Zeroing Practice Should Not Be Part of The Remedy.....	19
1.    Commerce should adhere to the United States’ clear international obligations and eliminate the use of zeroing when applying the differential pricing remedy.....	19
2.    If Commerce utilizes the zeroing methodology, it should only do so for sales found to be differentially priced .....	20
3.    The Department should also abandon its practice of not allowing negative AD margins for sales transactions not found to satisfy the differential pricing criteria to offset those that do. ....	23
CONCLUSION.....	24

## INTRODUCTION

These comments are submitted on behalf of the Korea Electronics Association (KEA) in response to the Commerce Department's request for comments regarding the continued development of a methodology for determining whether the legal criteria set forth in Section 777A(d)(1)(B), 19 U.S.C. 1677f-1(d)(1)(B), of the Tariff Act of 1930, as amended, have been satisfied and thereby justify use of an alternative comparison methodology for calculating antidumping ("AD") margins. The Department's request for comments was published in the *Federal Register* on May 9, 2014. *See Differential Pricing Analysis, Request for Comments*, 79 Fed. Reg. 26,720 (May 8, 2014).

KEA is an industry association that promotes and assists Korean electronics and ITC companies. KEA appreciates the opportunity to provide these comments to the Department.

KEA's comments below focus on broad principles that KEA submits should be followed by the Commerce Department when continuing to develop a methodology for determining whether the legal criteria set forth in Section 777A(d)(1)(B), 19 U.S.C. 1677f-1(d)(1)(B), of the Tariff Act of 1930, as amended, have been satisfied and thereby justify use of an alternative comparison methodology for calculating antidumping ("AD") margins. In particular, KEA submits that the Commerce Department's past experience demonstrates that it is appropriate to review core principles that should be followed.

## **COMMENTS**

### **A. The Methodology Should Reflect That The Governing Legal Criteria Create An Exception, And Are Not Meant to Establish A Rule.**

The Commerce Department's recent practice suggests that the Department has forgotten that the very legal criteria being implemented (namely, 19 U.S.C. § 1677f-1(d)(1)(B)) are set forth in a statutory provision entitled "Exception". KEA submits that it is appropriate to reiterate this point, and highlight the extent to which the Department seems to have lost sight of this important point, turning the exception into an automatic rule.

Following the conclusion of the Uruguay Round and the adoption of the WTO AD Agreement, U.S. antidumping law was modified to reflect both the new preference for using the average-to-average comparison methodology and the possible use of the average-to-transaction comparison exception methodology pursuant to the second sentence of Article 2.4.2 of the WTO AD Agreement. The past U.S. practice of comparing individual transactions in the U.S. market to the average prices in the comparison market had to change.

The U.S. new statutory provision, 19 U.S.C. §1677f-1(d) largely mirrors the language of Article 2.4.2 of the WTO AD Agreement. Specifically, Section 1677f-1(d)(1)(A) initially sets forth the general rule to compare average price to average prices,

tracking the first sentence of Article 2.4.2. And Section 1677f-1(d)(1)(B) then sets forth the exception, tracking the second sentence of Article 2.4.2 of the WTO AD Agreement.

**d) Determination of less than fair value**

(1) Investigations

**(A) In general**

In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value—

- (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
- (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

**(B) Exception**

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

19 U.S.C. 1677f-1(d)

Unfortunately, it appears that the Commerce Department has forgotten this basic point. Essentially, the United States has shifted its test for determining the applicability of the “exception” in ways that have dramatically increased the frequency of both testing for and then finding that the exception applies. This can be seen by a simple comparison of Commerce’s past findings.

- From January 1, 1995 (the effective date for the changes to U.S. law) until the end of 2006 (a period of 12 years), Commerce initiated 404 AD cases and imposed 110 antidumping orders, but in just 4 of those proceedings (fewer than one percent of all AD cases) did Commerce investigate the existence of targeted dumping.
- Over the first three year period of Commerce’s new era of targeted dumping, from 2008 to 2010, there were 58 antidumping investigations, and targeted dumping was alleged in 17 of them – a frequency of 29 percent.

- Over the next three years, from 2011 to 2013, there were 26 antidumping investigations, and targeted dumping was alleged in 16 of them – a frequency of 62 percent.
- And now the frequency is 100 percent. In late 2013, when it shifted to the new differential pricing, Commerce made this analysis a standard part of its dumping margin programming language testing for differing prices in every single case.

So now with or without any allegations, Commerce will conduct its differential pricing analysis for all proceedings – both original investigations and administrative reviews.

Since this policy shift, Commerce applied its differential pricing analysis in all original investigations and administrative reviews. And although the Department does not find targeted dumping or differential pricing in every case, the frequency of such findings has also increased.

As noted above, what began as a phenomenon that arose in virtually no cases has become routine in virtually every case. The way in which the Commerce Department has transformed a seldom used exception into a standard part of the computer code applied in every single U.S. antidumping proceeding – both original investigations and administrative reviews – underscores how Commerce has forgotten that the legal criteria is supposed to be an “exception,” not a rule applied to every case.

## **B. The Department Should Adopt A Proper Interpretation of The Statutory Term “Significantly”**

As made clear by the statutory language itself, 19 U.S.C. § 1677f-1.2 requires not only that the prices examined differ, but also that they differ “significantly.” The word “significant” or “significantly” means more than just “large.” Indeed, the word “significant” conveys both qualitative and quantitative aspects. KEA urges the

Department to reflect this understanding in implementing the statutory language. And KEA further submits that adopting a proper interpretation of “significantly” requires allowing respondents to provide explanations as to *why* prices differ. We address each below.

### **1. “Significant” means more than just large**

The first definition of the word “significantly” provided by the New Shorter Oxford English Dictionary is “having or conveying meaning.” While the English word may also have quantitative aspects,<sup>1</sup> there is no doubt that the qualitative aspects of the word are at least as important, if not more so, than the quantitative aspect.

The ordinary meaning of the word “significant” as encompassing more than merely quantitative consideration is also evident by the applicable statutory context and purpose of the relevant provision. With respect to the statutory context and purpose of the phrase “differs significantly,” the relevant sentence is an exception to the general rule that the authority compare average prices in both the export and normal value markets (or individual transaction prices in both markets). When average prices are used, quantitative differences among individual export prices, even large differences, are eliminated by the averaging process. When individual prices are examined, on the other hand, it would not be unusual to find large variations in those prices. Large individual price differences in this context would thus likely be perfectly normal. The fact that the text uses the word “significantly,” rather than “large” to describe the differences in prices

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<sup>1</sup> Merriam Webster contains a definition that includes “large enough to be noticed or have an effect.” The same dictionary, however, includes the definition “having a special or hidden meaning.”

in this context supports the conclusion that the drafters of the provision intended the word to mean something more than merely large differences. And therefore, the use of the word “significantly” in the context of 19 U.S.C. § 1677f-1 2 suggests that it was intended to refer to differences that are “meaningful,” not merely large, emphasizing the qualitative aspects of the term.

The underlying purpose of the AD law also confirms the importance of the qualitative aspect of the word “significantly” in 19 U.S.C. § 1677f-1. The AD law requires that there be a “fair comparison” between export price and normal value. Again, since the normal rule set forth in 1677f-1 2 requires use of both average export price and average normal value in most cases, quantitative differences in individual prices will balance out in the averaging process and a fair comparison can be made in most cases. However, where individual export prices are compared to average normal value under the exception (set forth in 19 U.S.C. § 1677f-1), otherwise explainable differences in individual prices could result in comparisons that are not “fair,” since numerical differences would be smoothed out in the calculation of normal value but not in the export price.

In this context, it is apparent that the use of the word “significantly” to describe price differences must mean something other than merely large quantitative differences. It must mean price differences that are meaningful enough in some particular situations that averaging them in with other export prices would not lead to a “fair comparison.”

Despite the obvious broader meaning of the word “significant” that requires consideration of the qualitative aspects of price differences, the Department has

repeatedly invoked the exception set forth in 19 U.S.C. § 1677f-1 based on exclusively numerical criteria, rather than holistically evaluating both quantitative and qualitative dimensions. Indeed, the Department’s differential pricing test sets forth purely quantitative criteria. The Department then applies these tests mechanically, and then analyzes only the quantitative differences among those average prices, never examining the reasons for any price differences. To the contrary, when the respondents suggest other reasons for the differences in export prices, the Department typically refuses to consider those reasons.

KEA submits that the use of exclusively numerical tests to determine whether price differences are “significant” violates the ordinary meaning of the term.

## **2. Analyzing “significantly” requires allowing respondents to provide reasons why prices differ**

Based on numerous recent final determinations, it is clear that the Department applies its current differential pricing test mechanically and does not allow any consideration of *why* prices vary. Such mechanical application is not only wrong as policy matter; it is also contrary to the AD statute.

When the AD statute uses the terms “significantly” and “pattern” it does mean just that a difference is large and a certain number of transactions. A significant difference has to be large, but it also has to be meaningful in some specific context. A pattern is not just a number of transactions, but a number of transactions that show something. Thus, in the context of targeted dumping, significant differences and the pattern must be meaningful for the effort to identify possible targeted dumping. Differences that occur

for some natural business reasons are thus not “significant” in this context. Such differences have been explained and they are not targeted dumping. Not taking into account the reasons for price differences means the Department’s test is flagging as targeted dumping many instances that cannot possibly be targeted dumping.

Consider two real world examples. First, consider the simple example of prices that are changing over time because costs are falling or rising. With changing costs it is essentially impossible for prices not to change, at least somewhat. Yet these price changes then trigger a finding of differential pricing. Prices to a single customer may change over time. Prices to different customers may vary depending on how much each customer bought at different points in time. Prices to different regions may vary depending on which customers bought during what point in time. In none of these situations does the price variation reflect anything other than normal business practices.

Or consider the example of foreign exporters matching the business practice of its U.S. competitors. If the U.S. companies have a practice of steep discounts during a holiday period, foreign companies have little choice but to follow this business practice set by the domestic firms. Again this situation does not reflect any targeting, but rather the reaction to pricing set by the domestic industry itself.

The facts of each case will be different. In some cases the Department might find the explanation reasonable and persuasive; in other cases the Department might find the explanation insufficient. But the point is that this determination should be made in each case based on the explanations offered and the degree to which the explanation can be

confirmed with record evidence in that case. It makes little sense to adopt a fixed rule at the outset that the reasons for a price difference never matter.

And so, KEA submits that Commerce should allow parties to rebut any preliminary finding of differential pricing by showing a neutral business justification (such as falling costs) that explains the price variance. Price variance for a normal business reason unrelated to any possible “targeted dumping” should not meet the definition of a proper test for differential pricing.

### **C. The Department Should Not Ignore Statistics When Adopting Improvements To Its Methodology**

We note that when it adopted its first regulation on targeted dumping, the Department specified that targeted dumping should be identified based on the application of “statistically valid” methods. Since then, the Department has withdrawn that targeted dumping regulation and avoided any mention of statistically valid methods. In fact, the Department has gone so far as to criticize the criteria of statistical validity as being too restrictive. KEA believes this shift away from statistics is both unnecessary and bad policy.

At the outset, KEA notes the irony of the Department’s shift. The prior regulation did not require any specific test, just that the methods used to identify targeted dumping be statistically valid. This guiding principle did not restrict the Department in any specific way. By abandoning this test, the Department seems to be asserting for itself the flexibility to adopt statistically invalid techniques. Given the overarching responsibility

to act in a fair and reasonable manner, it is hard to see why the Department needs to adopt statistically invalid methods.

Statistics is not a set of rigid rules. Rather, the science of statistics is a logical and reasonable way to deal with problems that arise in the analysis of data. This entire field is dedicated to the types of issues that the Department needs to address when crafting specific methodologies for targeted dumping. Issues such as:

- Measuring variation in data, and how to make meaningful characterizations about data sets and differences between data sets.
- Distinguishing a true difference in two sets of data when there is a lot of variation in the data.
- Being explicit in deciding how confident one should be in the conclusions being drawn.
- How to deal with outliers in the data that might otherwise distort and bias the conclusion.
- When data sets are large enough to draw meaningful conclusions without the need to apply special rules for small data sets.

When thinking about these issues and others that are part of a properly crafted test for differential pricing, it seems truly odd that the Department would not draw upon relevant prior work in the field of statistics to inform the policy choices. Statistics would not dictate any specific results, but would provide an invaluable framework for thinking about these issues.

Indeed, that is precisely why the Department initially recognized these benefits and adopted the general principle of statistical validity. The Department should restore this basic principle to its approach to differential pricing.

**D. Commerce Should Explain More Clearly Why Averaging Cannot Take Into Account Price Differences**

The requirement that Commerce provide an “explanation” in 19 U.S.C. §1677f-1(d)(i)(B)(ii) is not a requirement that Commerce provide any old general explanation of its actions. Rather, it is an explicit requirement that Commerce explain specifically why the “significant” price differences in the targeted exports “cannot be taken into account” by the average-to-average price comparison methodology. The Department has responded to this argument by saying that it provides such an explanation by simply stating that there were differences in the margins using the average-to-average methodology as compared to the average-to-transaction methodology. However, this perfunctory statement does not constitute a reasonable explanation.

First, the mere fact that Commerce found overall dumping margins to be different under the two methodologies says nothing about the export transactions that fell within the “prices that differ significantly...” as required by the statute. An explanation that the overall margin was different using the average-to-transaction methodology fails utterly to explain why the differences among the targeted transactions “could not be taken into account” using the average-to-average methodology, as required by the statute.

Perhaps more significantly, the mere fact that Commerce found a difference does not in any way prove or explain why the “significantly” different pricing of exports “cannot be taken into account.” The Department ignores the fact that it applied its remedy for differential pricing— so-called “zeroing” or setting all negative dumping margins equal to zero – when it applies the average-to-transaction methodology. When

the Department applies this particular remedy under the average-to-transaction methodology, the resulting *overall margins will always, necessarily, be higher than they are under the average-to-average methodology*, so long as there is even one export sale priced above normal value. Consequently, a different result inevitably occurs from the remedy, because the “negative margins” on any above-normal value sales are set to zero and are not allowed to offset the positive margins on any below-normal value sales.

Yet the Department is not required by statute to use this particular remedy on any sales to which it applies its average-to-transaction methodology. Essentially, the Department is justifying its use of this specific remedy, by applying the remedy and then comparing the outcomes. But this logic is circular. The Department does not explain why the average-to-average transaction methodology “cannot take into account” the price differences it found to be significant when it merely announces that the margins are higher using that methodology, because it fails to explain to what extent the higher margins were purely the result of setting negative margins equal to zero, rather than the result of the price differences themselves.

As importantly, based on past cases, the Department provides no explanation as to how or in what way the differences in margins under the two methodologies were “meaningful.” Commerce does not, for example, state that the margins were more than X percent, and therefore were significant; nor does Commerce mention any other circumstances (such as the nature of price competition in the market) to shed light on why the differences it found would be meaningful. Thus Commerce’s explanation of the

difference is little more than an *ipse dixit* statement: the differences in margins are meaningful “because I said so.”

It must be remembered that the statute does not require Commerce to explain why the differences in margins under the two methodologies are meaningful. It requires Commerce to explain why the average-to-average methodology “*cannot take*” the “*significant differences*” in prices into account. A statement that there are “meaningful” differences between the results of the two methodologies does not even begin to fulfill the requirement of the statute. As noted above, for example, if Commerce applied the average-to-transaction methodology without zeroing, there might well be no difference in the margins under the two methodologies. Thus, use of an average-to-average methodology might well take the significant differences in export prices fully into account. Commerce’s “explanation” is thus not an explanation at all. It is wholly unresponsive to the requirement set forth in the statute.

#### **E. The Department Should Apply The Concept of Negligibility**

The Department currently uses a 25% change in the margin as the sole test to determine if averaging cannot take into account price differences. The Department then applies this percentage test mechanically to any AD margin, no matter whether it is large or not.

This approach leads to absurd results. Although this test may be reasonable for larger margins, that reasonableness breaks down for lower margins. For an AD margin of 50% the Department will ignore a change in that margin of up to 12.5 percentage points

because that change falls below the 25% test. For an AD margin of 5%, in contrast, the Department will act on a change of 1.3 percentage points because that change is more than the 25% test. It makes no sense to say that a 1.3 percent point change matters in this context, just because it is more than 25% of 5 percentage points. In fact, when comparing a 1.3 percentage point margin, the Department's *de minimis* rules would deem that margin no different than zero and it would be ignored. It is illogical for a 1.3 percent margin to be *de minimis* on its own, but to be deemed significant enough to require invocation of some special comparison rules in the context of targeted dumping.

Using the same rules as currently in effect for *de minimis* margins, Commerce should ignore any change of the margin that would be considered *de minimis* and conclude that the averaging can take into account those price differences. This modification would mean that changes in the margin of less than 2.0 percentage points in an investigation or less than 0.5 percent in an administrative review would be deemed so small that the use of averaging can take into account those price differences. If the change in the margin is so small that it would be deemed *de minimis* on its own, then such a small change should be treated as not requiring departure from the rule to use average prices.

And therefore, KEA submits that Commerce should ignore any change in the AD margin that would be less than the *de minimis* threshold when deciding whether averaging cannot take into account price differences.

**F. The Remedy Should Not Be Applied To Transactions for Which The Department Has Determined Have Not Met The Criteria**

In past cases in which the Department found the existence of targeted dumping the Department applied its remedy for targeted dumping— using the average-to-transaction calculation methodology – to *all* of the respondent’s U.S. sales transactions, instead of only to those U.S. sales transactions that satisfied the targeted dumping test. The Department’s new differential pricing methodology continues to do so above an arbitrary 66% cutoff. An approach which applies the alternative remedy to any U.S. sales that have not been found to meet the test for differential pricing cannot be sustained.

The statute -- 19 U.S.C. § 1677f-1(d) -- specifies the methodology for calculating dumping margins, and requires the Department to apply the exception only to those sales found to qualify for the exception. This provision has several key elements that the Department has ignored in past cases when applying the exception to all sales.

First, the Department has allowed the discretionary to trump the mandatory. The statute provides that the Department “shall determine” the dumping margin based on a comparison of either (1) weighted averages, or (2) specific transactions.<sup>2</sup> The statute thus creates a strong presumption in favor of using one of these two methods. The statute provides a limited exception: the Department “may determine” dumping through comparison of the weighted average of the normal values with individual transactions for comparable merchandise, but only under certain specific circumstances.<sup>3</sup> The statute is neutral as between using average-to-average or transaction-to-transaction comparisons;

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<sup>2</sup> 19 U.S.C. § 1677f-1(d)(1)(A)(emphasis added).

<sup>3</sup> 19 U.S.C. § 1677f-1(d)(1)(B)(emphasis added).

the statute is not neutral as between those primary methods and using the exceptional average-to-transaction method. The Department can only apply the exception when the conditions for applying the exception are met.

Second, the Department’s past approach ignores the key statutory language “such differences.” The exception has two elements:

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, *and*
- (ii) the administering authority *explains why such differences* cannot be taken into account using a method described in paragraph (1)(a)(i) or (ii).<sup>4</sup>

The statute thus focuses specifically on those transactions that have been found to be a “pattern” and that “differ significantly.” These two statutory requirements – and both must be met – relate to the sub-set of transactions alleged to be targeted, not the entire universe of transactions.

Third, the Department’s past approach failed to explain why any differences cannot be taken into account. Even if the Department explained why the transactions with “such differences” that meet the “pattern” and “differ significantly” requirements cannot be taken into account, that does not explain why other transactions without “such differences” cannot be taken into account. In fact, it is hard to imagine any justification to explain why transactions without “such differences” need a special method to address the very differences that do not exist.

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<sup>4</sup> 19 U.S.C. § 1677f-1(d)(1)(B)(emphasis added).

The plain meaning of this statutory language is quite clear on its face. Indeed, the Department previously agreed with this interpretation. When drafting its prior regulation, the Department used this statutory language as one of the main reasons to conclude it would “apply the average-to-transaction approach solely to address the practice of targeted dumping,” and apply the exception “exclusively to those sales in which the criteria for determining targeted dumping are satisfied.”<sup>5</sup> Indeed, after much debate and discussion, the Department enshrined this policy in the language of the regulation itself:

*(2) Limitation of average-to-transaction method to target dumping.* Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

Thus, the Department adopted a specific regulatory requirement to apply targeted dumping only to those sales that met the requirements for the exception, unless the Department explained (based on substantial evidence) why this “normally” applicable rule did not apply in a particular case.

Moreover, when adopting this regulation, the Department specifically addressed the suggestion that the exception should be applied to all sales, not just those sales found to meet the statutory requirement. The Department specifically rejected this suggestion:

... because in many instances this approach would be unreasonable and unduly punitive. For example, if targeted dumping accounted for only 1 percent of a firm’s total sales, there would not appear to be any basis for applying the average-to-transaction method to those sales accounting for the remaining 99 percent.

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<sup>5</sup> 62 Fed. Reg. 27296, 27375 (May 19, 1997).

61 Fed. Reg. 7308, 7350 (Feb. 27, 1996). The policy of applying the exception only to those transactions that had met the required elements of the exception thus rested on both statutory interpretation and sound policy considerations.

And so, the Department's approach ignores the statute and instead imposes, in the Department's own words, a potentially "unreasonable and unduly punitive" methodology. The statute, 19 U.S.C. § 1677f-1(d)(1)(B)(ii), requires the Department to explain why "such differences" cannot be taken into account. The phrase "such differences" refers to those transactions that constitute a "pattern" and that "differ significantly." The phrase "such differences" does not apply to those other transactions that do not have such differences. The second criteria, therefore, by definition, can apply only to those transactions that have been found to be targeted, or that have been explained in some other way.

Moreover, the Department has never provided any explanation as to why an approach to apply the remedy to all transactions is reasonable. The Department's old logic appeared to be that if the exception applied to any of the transactions, then it should apply to all of the transactions. And, under the new methodology the same conclusion is drawn if the exception applies to an arbitrary cutoff of 66% of the value of sales; then it should apply to all sales. This logic is bizarre on its face. But regardless of the merits of the logic, it cannot override the statutory requirement that the exception only apply to those transactions that qualify for the exception. And, it cannot override the necessity for adopting a reasonable approach in cases in which the Department must fill the gaps in the statutory language.

## **G. The Zeroing Practice Should Not Be Part of The Remedy**

### **1. Commerce should adhere to the United States' clear international obligations and eliminate the use of zeroing when applying the differential pricing remedy**

Commerce currently applies the zeroing methodology to at least a portion of all sales where (1) the statutory criteria for targeted dumping are satisfied and (2) the ratio of sales that pass the Cohen's *d* test exceeds 33 percent. Specifically, where the statutory criteria are satisfied and Commerce determines that the average-to-average comparison methodology cannot account for price differences, it applies the average-to-transaction methodology (and zeroing) to only those sales that pass the test where that percentage is between 33 and 66 percent, and applies the average-to-transaction methodology to all sales where that percentage is greater than 66 percent. Commerce's decision to apply zeroing to these sales violates a long line of WTO precedent. It serves all parties' long term interests for Commerce to adopt a policy that complies with international obligations.

The WTO jurisprudence on the use of zeroing in antidumping proceedings is well-established. Article VI:1 of the General Agreement on Tariffs and Trade 1994 and Article 2.1 of the Anti-Dumping Agreement define the concepts of "dumping" and "margin of dumping" under the covered agreements. The text of both make clear that the determination of dumping must be made with respect to the product as a whole, and not any subset of the product under investigation. While this definition does not prevent an authority from undertaking multiple comparisons using groups or models, the results of the multiple comparisons at the sub-product level are not "margins of dumping." Rather,

those results reflect only intermediate calculations made by an authority in the context of establishing the margin of dumping for the product under investigation. Only by aggregating the intermediate values can an authority establish a margin of dumping for the product as a whole.

Beginning with the decision in *EC – Bed Linen*, the Appellate Body has repeatedly and consistently held that dumping margins must be calculated with respect to the “product as a whole.” As explained in *US – Softwood Lumber V*, “dumping , within the meaning of the Anti-Dumping Agreement, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.” An authority may not selectively use some prices when determining the dumping margin while excluding other prices.

Under Commerce’s current practice, a subset of all sales – those that produce a negative dumping margin – are systematically eliminated from the final dumping margin calculation. Where Commerce applies the average-to-transaction comparison methodology and the percentage of sales that pass the ratio test exceeds 33 percent, certain transactions are excluded from the calculation. Based on clear WTO precedent, this current practice is in violation of the United States’ obligations. Commerce should bring its practice into conformity with those obligations and eliminate the use of zeroing.

## **2. If Commerce utilizes the zeroing methodology, it should only do so for sales found to be differentially priced**

As explained above, Commerce’s current practice applies the zeroing methodology to all sales where it determines that more than 66 percent of U.S. sales have

met the criteria. Under this scenario, Commerce applies zeroing even to those sales that do not meet the statutory criteria of targeted or differentially priced sales. Thus, some sales that are not even found to be differentially priced are arbitrarily eliminated from the dumping margin calculation. Commerce should revise this practice, as it is contrary to both the U.S. antidumping statute and the United States' international obligations.

The antidumping statute specifies the methodology for calculating dumping margins and requires Commerce to apply the exceptional comparison methodology only to those sales found to qualify for the exception. Commerce's current practice ignores several critical elements of the statute. First, Commerce has allowed the discretionary to trump the mandatory. The statute provides a limited exception to using the standard average-to-average methodology. That exception can only be triggered when the conditions set forth in the statute have been satisfied. Commerce has expanded the scope of this exception beyond the language in the statute through applying the exception to sales that have not satisfied the necessary conditions.

Second, Commerce's current practice ignores the statutory requirement that Commerce explain why "such differences" in prices cannot be taken into account using the standard methodology. There is no rationale for applying an alternative methodology to transactions without "such differences" in pricing. The alternative methodology is intended to address an issue that is specifically missing in the non-differentially priced sales.

KEA's suggested change is consistent with Commerce's prior stance on this very issue. In promulgating the targeted dumping regulation, Commerce cited the statutory language as a reason for it to "apply the average-to-transaction approach solely to address the practice of targeted dumping," and apply the exception "exclusively to those sales in which the criteria for determining targeted dumping are satisfied."<sup>6</sup> The text of the statute that formed the basis of Commerce's past conclusion has not changed. Nor has the practical consideration that applying the alternative methodology to non-differentially priced sales can "in many instances { } be unreasonable and unduly punitive," another finding previously made by Commerce.<sup>7</sup> The underlying facts have not changed, and nor should have Commerce's policy.

In addition to the U.S. legal and policy reasons supporting KEA's suggested change, the United States' international obligations likewise compel Commerce to do so. Article 2.4.2 of the Antidumping Agreement, like the antidumping statute, presumes the use of the average-to-average comparison methodology. An authority can deviate from this methodology only under specifically defined circumstances, as found in the second sentence of Article 2.4.2. But the Antidumping Agreement makes clear that the exception does not apply to those transactions not found to meet the criteria. Nothing in the text of the Antidumping Agreement or any other agreement permits Commerce to apply the exceptional average-to-transaction methodology to export transactions that do

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<sup>6</sup> 62 Fed. Reg. 27296, 27375 (May 19, 1997).

<sup>7</sup> 61 Fed. Reg. 7308, 7350 (Feb. 27, 1996).

not meet the criteria. Commerce's current practice directly contravenes the clear text of the Antidumping Agreement.

**3. The Department should also abandon its practice of not allowing negative AD margins for sales transactions not found to satisfy the differential pricing criteria to offset those that do.**

In addition to employing the two actual zeroing practices noted above, under its current approach, the Department also employs an effective zeroing practice when it calculates the final AD rate for an investigated foreign exporter. Specifically, whenever the Department determines more than 33 percent, but fewer than 66 percent, of the U.S. sales transactions have sales prices that meet the differential pricing criteria, the SAS code utilized by the Department actually calculates two separate AD margins: (1) an AD margin for those transactions for which the Department has found satisfied the differential pricing criteria (for which zeroing is employed) and (2) an AD margin for those transactions for which the Department did not meet the differential pricing criteria (for which no zeroing is employed). The SAS code then combines the two AD margins in order to generate a single AD rate for the investigated exporter. However, when it does so, if the second AD margin (for transactions not meeting the differential pricing criteria) is negative, such negative AD margin is not allowed to offset whatever positive AD margin exists for the first AD margin (for transactions satisfying the differential pricing test).

KEA submits that such practice effectively constitutes zeroing that the WTO Appellate Body has condemned. And so, KEA urges the Department to abandon this practice.

### **CONCLUSION**

KEA respectfully urges the Department to take these comments into account when continuing to modify the particular methodologies used to implement 19 U.S.C. § 1677f(d)(1)(B).